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IN THE
COURT OF APPEALS OF INDIANA

TAMERA J. RICHARDS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A04-0612-CR-740
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE CIRCUIT COURT
The Honorable Donald L. Daniel, Judge
Cause No. 79C01-0511-FC-52

May 31, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Tamera J. Richards appeals her sentence following convictions for Possession of a Controlled Substance, as a Class C felony, and being an Habitual Substance Offender pursuant to a guilty plea. She raises a single issue for our review, namely, whether her sentence is inappropriate in light of the nature of the offense and her character.

We reverse and remand with instructions.

FACTS AND PROCEDURAL HISTORY

On September 10, 2005, Richards was stopped in her vehicle within 1000 feet of an elementary school in Tippecanoe County. She had in her possession unprescribed hydrocodone, a controlled substance. On November 3, the State charged Richards with possession of a controlled substance, as a Class C felony, and with being an habitual substance offender. On July 7, 2006, Richards pleaded guilty to both counts. Her plea agreement provided in relevant part:

> 1. That the defendant shall plead guilty to Count I, Possession of a Schedule III Controlled Substance as a Class C felony[,] and shall admit to being an Habitual Substance Offender, and any remaining counts herein shall be dismissed at the time of sentencing.
>
> 2. That the defendant shall receive such sentences as this Court deems appropriate after hearing any evidence or argument of counsel. The defendant waives notice of aggravating circumstances and factors for sentencing purposes and waives his/her right to a jury to decide aggravating circumstances and factors. The defendant consents to judicial fact-finding regarding aggravating and mitigating factors to determine the appropriate sentence. However, the executed portion of any sentences imposed shall not exceed a cap of three (3) years.

Appellant's App. at 23. Thus, Richards agreed to leave sentencing open to the trial court, so long as the total length of her executed time did not exceed three years imprisonment.

At the subsequent sentencing hearing, the trial court made the following statements in sentencing Richards:

> The Court finds as a mitigating circumstance that the defendant has taken responsibility for her actions by entering a plea of guilty in this matter. Also that the defendant does have strong family support shown by the people here today and the defendant's history of mental health problems. The Court finds as aggravating circumstances the defendant's criminal history, which includes three misdemeanor convictions, another misdemeanor pending. On one occasion the defendant failed to appear and a warrant was issued. Two judgment withhelds [sic] and one judgment withheld that eventually was dismissed. The Court notes that all of those were alcohol or marijuana related. An additional aggravating circumstance is the defendant's history of illegal alcohol and drug use. A third aggravating circumstance is that prior attempts at rehabilitation have not been successful. A fourth aggravating circumstances is the defendant's high LSI-R score and a fifth aggravating circumstance is that the defendant was recently rejected from the house arrest program. The Court . . . finds that the aggravating circumstances outweigh the mitigators and accordingly the Court sentences the defendant on count one [for possession of a controlled substance] to six years and on[] count two to four years, to run consecutively for a total of ten years. The Court orders that three years be executed through the department of corrections [sic] . . . . The Court orders that three years be served on supervised probation and four years on unsupervised probation.

Id. at 75-76. In other words, after finding five aggravating circumstances, the trial court enhanced Richards' conviction for the Class C felony to six years,[1] with three years suspended. The trial court then imposed a four year sentence on the habitual substance offender conviction, and ordered that sentence to be suspended and to run consecutive to the sentence on the Class C felony conviction.[2] This appeal ensued.

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[1] The sentence for a Class C felony conviction must be between two and eight years, and the advisory sentence is four years. Ind. Code § 35-50-2-6 (2006).

[2] As there was only one underlying conviction, the Class C felony, the crime to which the habitual substance offender sentence was to run consecutive is unambiguous in this case. However, we note that "[an] habitual offender finding does not constitute a separate crime nor result [sic] in a separate sentence, but rather results in a sentence enhancement imposed upon the conviction of a subsequent

DISCUSSION AND DECISION

Although the issue Richards raises on appeal is whether her sentence is inappropriate, before we may consider that issue we must first consider the legality of the sentence. Reffett v. State, 844 N.E.2d 1072, 1073 (Ind. Ct. App. 2006). "'A sentence that is contrary to or violative of a penalty mandated by statute is illegal in the sense that it is without statutory authorization.'" Id. (quoting Murray v. State, 798 N.E.2d 895, 903 (Ind. Ct. App. 2003)). A sentence that exceeds statutory authority constitutes fundamental error. Id.

Richards pleaded guilty to being an habitual substance offender. Pursuant to statute, when one is found to be an habitual substance offender "the court shall sentence [her] to an additional fixed term of at least three (3) years but not more than eight (8) years imprisonment, to be added to the term of imprisonment imposed under [Indiana Code] 35-50-2 or [Indiana Code] 35-50-3." Ind. Code § 35-50-2-10(f) (2006). And as we have stated:

> the habitual substance offender statute requires that the court "shall" sentence the defendant "to an additional fixed term" of between three and eight years. . . . We need scarcely mention that permitting the suspension of an enhanced sentence imposed under this statute would defeat the clear intent of the legislature to punish and deter recidivistic conduct.

Devaney v. State, 578 N.E.2d 386, 388-89 (Ind. Ct. App. 1991). See also Reffett, 844 N.E.2d at 1074. In other words, "where a criminal defendant receives an enhanced sentence under the habitual offender statute, such sentence may not be suspended." Reffett, 844 N.E.2d at 1074 (citing State v. Williams, 430 N.E.2d 756, 758 (Ind. 1982)).

[applicable crime]." Reffett v. State, 844 N.E.2d 1072, 1074 (Ind. Ct. App. 2006) (quoting Greer v. State, 680 N.E.2d 526, 527 (Ind. 1997)). Thus, hereinafter we refer to the trial court's sentencing on the habitual substance offender conviction as an enhancement to the Class C felony's sentence.

"Because the language of the habitual substance offender statute mirrors the language contained in . . . the general habitual offender statute, decisions interpreting the habitual offender statute are applicable to issues raised under [the habitual substance offender statute]." Roell v. State, 655 N.E.2d 599, 601 (Ind. Ct. App. 1995). Thus, an enhanced sentence under the habitual substance offender statute may not be suspended. See Reffett, 844 N.E.2d at 1074.

Here, however, the trial court erroneously suspended the four-year sentence it ordered for the habitual substance offender conviction. Presumably, this was done so that the trial court's sentencing order would reflect the three-year cap on the executed portion of Richards' sentence included in the plea agreement. See, e.g., Childress v. State, 848 N.E.2d 1073, 1078 n.4 (Ind. 2006) (stating that when "a plea agreement calls for a specific term of years . . . , if the trial court accepts the parties' agreement, it has no discretion to impose anything other than the precise sentence upon which they agreed."). But our supreme court has held that, when a sentence is invalid, it may be severed from the rest of the plea agreement:

> Although we acknowledge that a sentencing provision is an important component of a plea agreement, we do not agree that severing the sentence provision necessarily does violence to the remainder of the agreement. This is so because "the consequences of a guilty plea are collateral to the paramount issue of guilt or innocence." White v. State, 497 N.E.2d 893, 904 (Ind. 1986) (emphasis in original). Thus, where a defendant enters a plea of guilty knowingly, intelligently, and voluntarily, there is no compelling reason to set aside the conviction on grounds that the sentence is later determined to be invalid.

Lee v. State, 816 N.E.2d 35, 39 (Ind. 2004). Richards' guilty plea on the habitual substance offender charge required the trial court to impose, as an executed portion of

Richards' sentence, at least three years on top of the sentence for the Class C felony. See I.C. § 35-50-2-10(f). As the trial court ordered three years executed on the Class C felony, the total executed portion of Richards' sentence should have been six years. See I.C. §§ 35-50-2-6, -10(f). Since Richards makes no argument that her guilty plea was not made knowingly, intelligently, and voluntarily, "there is no compelling reason to set aside [her] conviction" even though her sentence was invalid. See Lee, 816 N.E.2d at 39. Because we hold that Richards' sentence of only three years' incarceration is illegal, we are compelled to reverse her sentence.[3] See Reffett, 844 N.E.2d at 1074.

Nonetheless, the plea agreement's requirement that Richards' sentence contain a three-year executed portion may still be valid. Indiana Code Section 35-50-2-2(a) plainly states that "[t]he court may suspend any part of a sentence for a felony, except as provided [by statute]."[4] (Emphasis added.) See also Huff v. State, 443 N.E.2d 1234, 1239 (Ind. Ct. App. 1983). Hence, if the sentence on the underlying Class C felony conviction is suspended, and Richards' sentence on the habitual substance offender enhancement is reduced to the three-year minimum and then ordered executed, Richards' sentence would comply with both the law[5] and the terms of her plea agreement.

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[3] Based on this holding, we do not consider whether the trial court abused its discretion in identifying and weighing aggravators and mitigators. See Gibson v. State, 856 N.E.2d 142, 146-47 (Ind. Ct. App. 2006) (holding that we review a trial court's sentencing statement "according to the standards developed under the 'presumptive' sentencing system, while keeping in mind that the trial court had 'discretion' to impose any sentence within the statutory range . . . 'regardless of the presence or absence of aggravating circumstances or mitigating circumstances.'").

[4] None of the listed statutory exceptions apply to the facts of Richards' case, and thus her case is distinguishable from Devaney v. State, 578 N.E.2d 386, 389 (Ind. Ct. App. 1991).

[5] We also note that Indiana Code Section 35-50-2-1.3(c) states:

We next consider whether the overall length of Richards' sentence is inappropriate in light of the nature of the offense and her character. We exercise with great restraint our responsibility to review and revise sentences, recognizing the special expertise of the trial bench in making sentencing decisions. Bennett v. State, 787 N.E.2d 938, 949 (Ind. Ct. App. 2003), trans. denied. This court will only "revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). Again, the trial court sentenced Richards to a total of ten years, which we reduce to nine, including both the executed and the suspended portions.

The overall length of the sentence imposed by the trial court, with the sentence on the habitual substance offender reduced from four years to three, is not inappropriate in light of the nature of the offense and Richards' character. Although the instant offense may not be particularly egregious, we conclude that the enhancement of Richards' sentence was based primarily on her character. The aggravating circumstances listed by

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> In imposing: . . . (2) an additional fixed term to an habitual offender under section 8 [I.C. § 35-50-2-8, the general habitual offender statute] of this chapter[] . . . a court is required to use the appropriate advisory sentence in imposing . . . an additional fixed term. However, the court is not required to use the advisory sentence in imposing the sentence for the underlying offense.

Normally, "decisions interpreting the habitual offender statute are applicable to issues raised under [the habitual substance offender statute]." Roell, 655 N.E.2d at 601. However, "'[w]hen certain items or words are specified or enumerated in a statute then, by implication, other items or words not so specified or enumerated are excluded.'" State v. Willits, 773 N.E.2d 808, 813 (Ind. 2002) (quoting Forte v. Connerwood Healthcare, Inc., 745 N.E.2d 796, 800 (Ind. 2001)). "This is so under an ancient doctrine of statutory construction: expressio unius est exclusio alterius." Id. Here, a plain reading of Indiana Code Section 35-50-2-1.3(c)(2) demonstrates that it enumerates only the general habitual offender statute. As such, by implication the habitual substance offender statute is excluded from Section 35-50-2-1.3(c)(2). We also do not address the application of Section 35-50-2-1.3(c)(2) to the general habitual offender statute.

the trial court, while generally describing the fact that Richards is an habitual substance offender, reflect poorly on Richards' character. Most notably, while the current charges were pending, Richards' violated the terms of her house arrest, failed to appear for a hearing, and had another misdemeanor charge pending for Public Intoxication.

We conclude that the revised sentence of nine years is not an inappropriate sentence. As a result, we remand and instruct the trial court, without a hearing, to issue an order and make any other docket entries necessary to sentence Richards to the enhanced sentence of six years for possession of a controlled substance, as a Class C felony, and to further enhance that sentence by three years, the minimum required by the habitual substance offender statute. The three-year enhancement required under the habitual substance offender statute is to be executed and the underlying six-year sentence imposed for the Class C felony is to be suspended. We adopt the trial court's original conditions of probation, which Richards does not challenge on appeal.

Reversed and remanded with instructions.

RILEY, J., and BARNES, J., concur.